Filed 5/1/12 P. v. Hernandez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL PLACENCIA HERNANDEZ,

Defendant and Appellant.

F061951

(Super. Ct. No. VCF232966)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gerald F. Sevier, Judge.

Barbara Coffman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, R. Todd Marshall and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Joel Placencia Hernandez was charged with several counts related to two burglaries and one attempted burglary in Tulare County in late 2009 and early 2010.

He appeals solely from his conviction for receipt of stolen property related to the 2010 burglary.[1] Underlying his four claims is the trial testimony and prior statements to police of one Diego Lua. For the reasons discussed below, we affirm the judgment in all respects.

FACTUAL AND PROCEDURAL BACKGROUND

As appellant raises claims only as to count 5, receiving stolen property, we provide facts relevant only as to that count. Members of the Perez family found on the morning of January 26 that a shop on their farm property had been broken into overnight and a number of items stolen, including a shipment of agricultural chemicals recently received, and various tools and pieces of farm equipment.

In the course of investigating the burglary, on January 26, Detective Gary Marks of the Tulare County Sheriff's Office spoke with Diego Lua, a ranch owner who had previously been connected with stolen agricultural chemicals. Lua permitted Detective Marks to search his storage area for the stolen chemicals, and Detective Marks found some items identical in brand to those items that had been reported stolen by the Perez family.

Lua agreed to go to the police station that day and talk further with Detective Marks. This conversation was recorded. At the police station, Lua told Detective Marks, without the help of an interpreter, that appellant had been by his ranch the previous evening (January 25) offering to sell him some chemicals -- specifically herbicides -- and some tools that appellant had in his truck. Lua also told Detective Marks that appellant had brought the chemicals that Detective Marks had found on Lua's property. He also told Detective Marks during that interview that appellant would come by his ranch almost every day, and sometimes twice a day, with chemicals to sell. At the end of the

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[1] All further date references are to the year 2010 unless otherwise noted.

interview, Lua also identified appellant in a photo lineup as the person bringing chemicals to sell.

At trial, Lua testified, with the help of an interpreter, that he could not remember the vast majority of what he told Detective Marks during the police interview. The trial court implicitly found that Lua was being deliberately evasive and permitted admission of Lua's prior statements that he made to Detective Marks at the station. The jury listened to excerpts of the recorded conversation with the aid of a transcript of the recording. Detective Marks also testified about their conversation.

With respect to the January incident, appellant was charged with burglary (Pen. Code, § 459)[2], grand theft (§ 487, subd. (a)), and, in count 5, receipt of stolen property (§ 496, subd. (a)). The jury found him guilty of receipt of stolen property, but acquitted him of the burglary and grand theft charges.[3] The trial court sentenced appellant to a total prison term of eight years, which included terms for other pending cases disposed of prior to sentencing.

DISCUSSION

Appellant's claims flow from the underlying contention that Diego Lua's statements to Detective Marks on January 26 should not have been admitted. He claims that the trial court erred in finding that Lua was being deliberately evasive on the witness stand and, furthermore, that his prior statements to police were not inconsistent with the testimony he was giving at trial. He further contends counsel provided ineffective assistance of counsel in failing to object on proper grounds to admission of the statements. Appellant also asserts the trial court had a duty to instruct the jury on

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2 All further statutory references are to the Penal Code unless otherwise indicated.

3 Appellant was also charged with, and convicted of, second degree burglary and petty theft (§ 484) with respect to an incident on or about December 12, 2009; and attempted second degree burglary that occurred in April 2010.

accomplice testimony, because evidence presented at trial could have led the jury to believe Lua was an accomplice to the receipt of stolen property offense. Moreover, appellant claims insufficient evidence supports appellant's conviction of receipt of stolen property, especially given the inadmissibility of Lua's statements. As we shall discuss, the record does not support appellant's contentions.

I.

ADMISSION OF DIEGO LUA'S STATEMENTS TO POLICE WAS PROPER

We look first to the propriety of admission of Lua's prior statements to the police. In reviewing a trial court's determination of admissibility of evidence, we look for abuse of discretion. "On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question ….' [Citations.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008 (*Hovarter*).) Admission of prior inconsistent statements is an exception to the exclusionary hearsay rule. (*Id.* at p. 1008; Evid. Code, § 1235.)

"Under the abuse of discretion standard, 'a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*Hovarter, supra*, 44 Cal.4th at p. 1004.)

"A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.[**4**] The 'fundamental

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4 "Evidence Code section 1235 provides as follows: 'Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.'

"Evidence Code section 770 provides that: 'Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness

requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her prior statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.) "The requisite finding is implied from the trial court's ruling. [Citation.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 712 (*Ledesma*).)

Relevant Facts

At trial,[5] Lua testified he could not remember: seeing appellant with chemicals in his truck; Detective Marks asking him about appellant; telling Detective Marks about the frequency of appellant's visit to his (Lua's) ranch; telling Detective Marks that appellant brings chemicals almost every day; telling Detective Marks about appellant's green truck; or why he marked appellant's picture in a photo lineup. Lua did recall going to the police station for the interview, but claimed not to remember anything before seeing the photo lineup. He recalled Detective Marks visiting his ranch and going into his chemical

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was so examined while testifying as to give him an opportunity to explain or to deny the statements; or [¶] (b) The witness has not been excused from giving further testimony in the action.'"

[5] Lua testified on January 12, 2011, and was subject to recall thereafter. His interview at the police station with Detective Marks took place on January 26, 2010.

storage shed, but did not remember Detective Marks removing any chemicals, nor telling Detective Marks to take any chemicals.

Over defense counsel's objection, Detective Marks testified as to Lua's statements during the interview at the police station, where Lua had told him that appellant had shown up at Lua's ranch the night of January 25, in his green truck, around 9:00 p.m., and offered to sell him everything in the back of his (appellant's) truck, the contents of which Lua had described as herbicides and tools. This interview was recorded, and relevant portions were played back for the jury.

Analysis

Our Supreme Court upheld the admission of a witness's prior inconsistent statements where the witness at trial: "initially testified she did not remember having a conversation with defendant concerning a robbery or murder. Subsequently, she denied that he ever had told her he was going to kill someone. [The witness] recalled speaking to a police officer … and she recalled testifying at the preliminary hearing … [b]ut she stated she did not remember what she testified about, and did not remember testifying that defendant had told her he had killed somebody. She did remember being in the district attorney's office during the last year and listening to a tape recording in which she was speaking to a man about defendant, but stated she did not remember many of the things she said on the recording. …. [¶] After [the witness] read a copy of her prior preliminary hearing testimony, she testified that she still did not remember her testimony or the conversations with defendant to which she had testified." (*Ledesma*, *supra*, 39 Cal.4th at pp. 710-711.) Thus, over defense objection, the trial court permitted the prosecutor to have a portion of the witness's preliminary examination testimony read to the jury, and to introduce evidence of statements the witness made during a police interview. (*Id.* at p. 711.) The *Ledesma* court concluded, "[a]lthough [the witness] consistently denied at trial being able to remember anything that defendant had told her,

what she had told the police, or her prior testimony, the record provides a reasonable basis to conclude she was being evasive. [Citation.]" (*Id.* at p. 712.)

Similarly here, Lua consistently denied at trial being able to remember anything he had told Detective Marks linking appellant with any chemicals, stolen or otherwise. He was shown the photo lineup and admitted the mark and signature by appellant's picture were his, but still could not recall the purpose of identifying appellant or the conversation prior to the photo lineup. Our review of the record finds a reasonable basis to conclude Lua was being deliberately evasive. The trial court did not abuse its discretion by permitting introduction of Lua's prior statements to Detective Marks.

II.
APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS MERITLESS

Appellant's sole contention as to ineffective assistance of counsel is that defense counsel either failed to object, or objected on nonrelevant grounds, to admission of Lua's prior statements, thus permitting inadmissible evidence to be heard by the jury. More specifically, appellant contends "counsel not only failed to object to the characterization of Lua's testimony … as inconsistent and willfully evasive, but counsel acquiesced in that characterization." As respondent noted, defense counsel did object to the admission of the statements.

The trial court had the opportunity to consider the statements in the context of a prior-inconsistent-statement claim, and the prosecution specifically argued the statements be admitted as prior inconsistent statements because of Lua's fabricated inability to recall his prior statements. Moreover, because we have found admission of Lua's prior statements to police was admissible, there was no ineffective assistance of counsel. (See *People v. Diaz* (1992) 3 Cal.4th 495, 562 [no ineffective assistance where objection would have been futile].)

III.

FAILURE TO GIVE ACCOMPLICE INSTRUCTIONS WAS HARMLESS ERROR

Appellant contends the trial court committed reversible error when it failed to sua sponte give jury instructions on accomplice testimony because evidence brought out at trial could have led the jury to infer Lua was an accomplice in the receipt of stolen property offense. Respondent asserts that we need not determine instructional error or the underlying premise that Lua was an accomplice, given that Lua's testimony was corroborated in any case.

Section 1111 prohibits conviction based solely on the uncorroborated testimony of an accomplice.[6] (§ 1111; *People v. Davis* (2005) 36 Cal.4th 510, 543 (*Davis*).) "When there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 965-966, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a reviewing court must evaluate whether it is reasonably probable that such error affected the verdict. [Citation.]" (*People v. Williams* (2010) 49 Cal.4th 405, 456 (*Williams*).) "Any error in failing to instruct the jury that it could not convict [a] defendant on the testimony of an accomplice alone is harmless if there is

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6 Section 1111 states pertinent part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

evidence corroborating the accomplice's testimony. '"Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense."' [Citation.]" (*Ibid.*)

Corroborating independent evidence """need not corroborate the accomplice as to every fact to which he testified but is sufficient if it *does not require interpretation and direction from the testimony of the accomplice* yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth …." [Citations.]' [Citations.]" (*Davis, supra,* 36 Cal.4th at p. 543.)

Lua's prior inconsistent statements constitute "testimony" for the purposes of section 1111. """[T]estimony" within the meaning of … section 1111 includes all oral statements made by an accomplice or coconspirator under oath in a court proceeding *and* all out-of-court statements of accomplices and coconspirators used as substantive evidence of guilt which are made under suspect circumstances. The most obvious suspect circumstances occur when the accomplice has been arrested or is questioned by police.' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 245.)

"In enacting section 1111, the Legislature intended to eliminate the danger of a defendant being convicted solely upon the suspect, untrustworthy and unreliable evidence coming from an accomplice, who is likely to have self-serving motives that affect his credibility. If an accomplice's testimony under oath is suspect, unreliable and untrustworthy, evidence of his prior inconsistent statements, not made under oath or in the presence of the trier of fact, must be deemed even more suspect, untrustworthy and unreliable." (*People v. Belton* (1979) 23 Cal.3d 516, 526.)

We thus review the record for evidence connecting appellant with receipt of stolen property in a way, that reasonably may have satisfied the jury, that Lua was telling the truth about appellant's solicitation to sell chemicals from the back of his truck to Lua on the same night that the Perez farm was burglarized. Our review of the record leads us to

the conclusion that sufficient independent evidence corroborates Lua's implication that appellant was connected to the receipt of the stolen chemicals.

Ramiro Perez, Jr. testified that he discovered at approximately 5:00 o'clock in the morning of January 26 that the family's shop had been broken into. His father informed him -- and he later confirmed -- that a number of agricultural chemicals had been stolen the night before, along with some other items being stored on the property. Detective Marks testified that he recovered some chemicals on Lua's property on January 26. Perez confirmed that some of the chemicals recovered from Lua's property matched some of the items that were taken from the shop.[7]

Detective Marks further testified that he interviewed appellant on January 26, after another deputy sheriff had detained appellant while appellant and another person were cleaning out appellant's truck. The deputy sheriff found no chemicals in appellant's truck. In that interview, appellant was "adamant he didn't know anything about any chemical thefts" "of any kind." After Detective Marks left the room and directed another deputy to take appellant to the county jail, however, appellant requested to speak to Detective Marks once more. Detective Marks testified it was then that appellant "told me if I'd let him go, he'd give me the names of the eight subjects he's selling chemicals to." Detective Marks declined to make a deal.

Items matching some of those stolen from the Perez family and recovered on Lua's property, coupled with defendant's admission to Detective Marks that he sold chemicals to at least eight people reasonably could have satisfied the jury that Lua was telling the truth to Detective Marks when Lua admitted that appellant had been the one who brought the chemicals that Detective Marks recovered from Lua's property on January 26. This corroboration could have led the jury to believe Lua was also telling the

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[7] Perez could not determine if the recovered bottles were the actual ones taken, or just matched in brand name and container size.

truth when he told Detective Marks that appellant had visited his ranch the night of January 25 with a truck full of herbicides. It is not reasonably probable that the lack of accomplice testimony instruction affected the verdict. (See *Williams, supra*, 49 Cal.4th at p. 456.)

IV.
SUBSTANTIAL EVIDENCE SUPPORTS APPELLANT'S CONVICTION FOR RECEIPT OF STOLEN PROPERTY

Along the same lines, appellant's sufficiency of the evidence claim must also fail. In reviewing a claim of insufficiency of the evidence, we apply settled standards: "'This court must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] If the circumstances reasonably justify the trial court's findings, reversal is not warranted merely because the circumstances might also be reasonably reconciled with a contrary finding. [Citations.] The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]'" (*People v. Williams* (1971) 5 Cal.3d 211, 214.)

The following evidence was presented at trial with respect to the Perez farm incident, including Diego Lua's statements to police which we have already concluded were admissible: 1) the Perez family farm shop was broken into on the night of January 25; 2) a recent shipment of chemicals and some tools were missing; 3) appellant visited Diego Lua around 9:00 p.m. January 25 in his green truck; 4) Lua saw in appellant's truck at that time chemicals (herbicides) and tools; 5) appellant tried to sell Lua everything in his truck at that time; 6) some items matching those stolen from the Perez farm the night before were found in Lua's chemical storage area the next day; 7) Lua admitted to Detective Marks at the police station that appellant had brought those stolen items that were found on Lua's property; and 8) appellant tried to make a deal with

Detective Marks by admitting he was selling chemicals to at least eight people, which could have reasonably led to the inference that appellant's sales of chemicals were illicit. Substantial evidence supported the jury's finding that appellant was in possession of the stolen property from the Perez farm, and knew the items were stolen. (§ 496, subd. (a).)

DISPOSITION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Dawson, Acting P.J.

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Kane, J.